United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1307

To be argued by
JOHN J. KENNEY

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1307

UNITED STATES OF AMERICA,
Appellee,

—v.—

BERNARD L. GOLDENBERG,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Bernard L. Goldenberg appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 14, 1976, following a five day trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 75 Cr. 385, filed on April 14, 1975, charged Bernard L. Goldenberg in two counts with evasion of federal income tax and the filing of a false United States Individual Income tax return for the year 1968, in violation of Title 26, United States Code, Sections 7201 and 7206(1).

Trial commenced on April 6, 1976, and April 12, the jury returned a verdict of guilty on both counts.*

On June 14, 1976, Judge Gagliardi fined Goldenberg $10,000 on Count One and imposed a prison term of two years, suspending all but six months of this term pursuant to Title 18, United States Code, Section 3651, and placing the defendant on probation for a period of five years following his release from prison. On Count Two, the court imposed a concurrent sentence of six months imprisonment and a five year period of probation, as well as an additional fine of $5000. Both of the fines imposed are committed fines. Judge Gagliardi, in addition, required Goldenberg to pay the costs of the prosecution.

The defendant Goldenberg is presently at large on a personal recognizance bond in the amount of $50,000 pending the outcome of this appeal.

Statement of Facts

A. Synopsis

The Government proved overwhelmingly that Bernard Goldenberg engaged in a scheme to divert a substantial portion of the proceeds of a public offering of stock to himself and failed to report the amount received as income on his federal tax return for 1968.

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* The jury deliberated for only 48 minutes before returning its verdict. (Tr. 777-78). "Tr." refers to pages in the trial transcript also included in appellant's appendix.

Mastercraft Electronics Corporation ("Mastercraft"), a company in which Goldenberg obtained an interest by way of its merger with First Standard Corporation ("First Standard") in 1967, issued $1.5 million of stock to the public in 1968. Goldenberg received approximately one-third of this amount in return for assisting in the stock offering.

This payment of $500,000 was made by John Gluskin, an attorney for Mastercraft, to Superior Plans, Inc. ("Superior Plans"), a shell corporation formed by Goldenberg for the purpose of receiving these funds. Goldenberg then withdrew the money from Superior Plans by causing checks to be issued to him which he then converted into cash. Goldenberg attempted to disguise the receipt of income from Gluskin by issuing $500,000 in convertible debentures of Superior Plans to Mastercraft and then having Gluskin immediately convert, on behalf of Mastercraft, the debentures into worthless stock of Superior Plans.

B. The Government's Case

1. The merger of First Standard into Mastercraft

On December 1, 1967, First Standard was merged into Mastercraft. (Tr. 65-69). Bernard L. Goldenberg was a principal shareholder in First Standard, a defunct company which held some cash and a patent for the manufacture of a video-tape recorder. (Tr. 65-66, 143). Mastercraft was actively engaged in subcontracting the manufacture of electronic equipment in Japan and importing and marketing the completed product in the United States. (Tr. 66, 143-45). After the merger, the new company operated under the name Mastercraft. (Tr. 67-68, 144).

2. The Mastercraft stock offering and Goldenberg's fee

At the time of the merger, it was agreed that money would be raised to finance the manufacture and sale of the video-tape recorder by the sale of stock of Mastercraft. At Goldenberg's suggestion, Philip R. Leeds, an attorney who had been employed by First Standard, drafted an agreement pursuant to which stock of Mastercraft would be sold and arranged the sale through brokers. (Tr. 70-72). However, before the sale of stock could be completed, Leeds, at Goldenberg's request, turned the handling of the transaction over to H. John (Harry) Gluskin, an attorney for Mastercraft. (Tr. 74, 93-94).*

Goldenberg had agreed with Gluskin to arrange for the sale of the Mastercraft stock in return for Goldenberg's receipt of 25 to 30 percent of the proceeds. (Tr. 182-83). The sale of stock began in February 1968 and the proceeds amounted to approximately 1.5 million dollars. (Tr. 73, 93).

3. The transfer and disguise of Goldenberg's fee

At Goldenberg's behest, on March 5, 1968, Gluskin opened a special account at the Chemical Bank New York Trust Company (Gluskin Special Account) for the proceeds of the sale of the Mastercraft stock. (Tr. 93-94, 205-06; GX 16).**

On March 7, Leeds formed a corporation under the name "Superior Plans, Inc." at the direction of Golden-

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* This was occasioned by Leeds anticipated move to Tucson, Arizona.

** "GX" refers to Government exhibits in evidence.

berg. (Tr. 24, 74-75; GX 9A, 9B, 9D).* On March 8, 1968, Superior Plans opened a checking account at the Central State Bank. (GX 30, 31; Tr. 275-79). On June 5, 1968 Superior Plans opened a second checking account at the Chelsea National Bank. (GX 21A, 34; Tr. 283-86).

Between March 8, 1968 and September 5, 1968 a total of $540,000 was drawn by check from the Gluskin Special Account payable to Bernard Goldenberg; $470,000 was deposited in the Superior Plans Account at the Central State Bank and $70,000 in its account at the Chelsea National Bank. (GX 17a-w; Tr. 213-18).

In return for this money, Goldenberg issued 50 debentures of Superior Plans to Gluskin in the amount of $10,000 which were convertible into common stock of Superior Plans. (Tr. 24, 80-87; GX 13, 22A). The purpose of these debentures was to disguise the payments to Superior Plans from the Gluskin Special Account as debt rather than income. To effect this disguise, Goldenberg received an undated letter from Gluskin converting all of the debentures into worthless common stock of Superior Plans.** (GX 14; Tr. 87-90). Although these debentures were to have been issued to Mastercraft, they were never received nor was any interest ever paid on them. (Tr. 188).

Goldenberg cashed $502,000 in checks drawn on the Superior Plans Accounts at the Central State Bank and the Chelsea National Bank at a check casher located on

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* Although no stock of Superior Plans was ever issued (GX 9B), it was clearly under Goldenberg's control. He was the President and only director, while Leeds was the Secretary. Goldenberg told Leeds he would own all of the stock. (Tr. 80-81).

** Superior Plans had no other assets and was merely a vehicle for this single transaction. Its stock, therefore, clearly had no value.

West 47th Street at a cost of 1%. (Tr. 312-15). Had a commercial check casher not been used, the withdrawal of cash in this amount would have required a financial institution, such as a bank, to report the transaction to the Department of the Treasury. (Tr. 543-44, See also 31 C.F.R. 103.1 (1969)). The remaining amounts were disbursed by Goldenberg by check.

4. Goldenberg's failure to report the fee as income on his 1968 federal return

Goldenberg did not include any of the moneys received from the Gluskin Special Account and withdrawn from Superior Plans on his Individual Income Tax Return for 1968. In fact, that return reported his taxable income for 1968 as a negative amount of $3244. (GX 1; Tr. 51-63). This income was also not included on the corporate income tax return for Superior Plans, Inc. for 1968 or for any other year. (GX 4, 5, 6; Tr. 59-63, 32).

C. The Defense Case

Goldenberg testified on his own behalf and claimed that Superior Plans was formed for the purpose of acquiring advertising agencies around the United States. (Tr. 362-63). John Gluskin did not, he claimed, pay him for selling stock in Mastercraft, although Gluskin did purchase a half-million dollars in debentures from Superior Plans. (Tr. 365-66).

Goldenberg admitted that $500,000 was transferred from the Gluskin Special Account to Superior Plans, but claimed that it had been invested through a Mr. Kimis in a motel to be constructed in Las Vegas; $50,000 as an increase in capital and the remainder for the purpose of securing a Nevada gambling license. (Tr. 381, 394).

The checks were converted into cash because Kimis had requested cash or bank checks. (Tr. 395).

In support of this defense, Goldenberg produced handwritten receipts for the cash from Kimis. (DX C; Tr. 396).* Kimis was not called as a witness. The money given to Kimis and his agents, Mr. Eriss and Mr. Feinberg, was not returned to Goldenberg. (Tr. 401). Goldenberg introduced minutes of Superior Plans approving these transactions.**

Incredibly, Goldenberg testified that, although he knew in 1969 the motel in Las Vegas in which he had invested $500,000 would never be built, he took no action to recover the money. (Tr. 190-93).

D. The Government's Rebuttal Case

During 1972, Goldenberg made statements to an Internal Revenue Agent, Leo Libowitz, which were inconsistent with his defense at trial. He told Libowitz that he had borrowed the money from Superior Plans and loan it to Arnold Kimis and that he had no recollection at that time of giving Gluskin debentures in return for the money he put into Superior Plans.

In addition, a part of Goldenberg's trial Exhibit C had been altered to remove a statement inconsistent with his defense. Prior to his Indictment, Goldenberg submitted a receipt for $14,537, among other documents, to the Internal Revenue Service in Washington, D.C., for handwriting analysis in support of his position that he had

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* "DX" refers to Defense exhibits in evidence.

** The Government argued that these were prepared by Goldenberg at a later date, but no evidence was introduced on this point. (Tr. 520-30).

given the money to Kimis. That receipt contained the following handwritten statement.

> "Final payment in full
> 90,800 shares"

Goldenberg submitted the same receipt to Libowitz in 1972 and produced a third copy at trial. Neither of these copies contained the handwritten statement. (Tr. 641-648; GX 52, 58; Tr. 396-98; DX C).

ARGUMENT

POINT I

The Judge Was Correct in Finding That John Gluskin Was the Defendant's Agent For Purposes of Making Statements In January, 1968.

The District Court admitted testimony that John Gluskin said in January of 1968 that Bernard Goldenberg would sell the Mastercraft stock and would receive 25 to 30 per cent of the proceeds of the sale on the theory that Gluskin was an agent of Goldenberg's at that time and the statement was within the scope of that agency. (Tr. 162-83).* Fed. R. Evid. 801(d)(2)(D). Goldenberg contends that the admission of this testimony was error because no agency relationship was established between Gluskin and Goldenberg. This argument is without merit.

Rule 801(d)(2)(D) of the Federal Rules of Evidence provides that a statement is not hearsay if it is offered

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* This testimony was given by Al Dayon, the former President of Mastercraft. At the time of trial, Gluskin was deceased.

against the defendant and is "a statement by [the defendant's] agent . . . concerning a matter within the scope of his agency . . . made during the existence of the relationship." In short, "[o]nce agency, and the making of the statement while the relationship continues, are established, the statement is exempt from the hearsay rule so long as it relates to a matter within the scope of the agency." J. Weinstein & M. Berger, Evidence ¶ 801(d)(2)(D)[01], at p. 801-37 (1975).

In the present case, Judge Gagliardi carefully evaluated the non-hearsay evidence establishing an agency relationship between Goldenberg and Gluskin in connection with the sale of Mastercraft stock, and correctly concluded that a fair preponderance of the non-hearsay evidence demonstrated that the two men were acting in an agency relationship.* See *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970). The record fully supports the judge's finding.

After the merger of First Standard and Mastercraft became effective on December 1, 1967, Goldenberg maintained an office at Mastercraft. (Tr. 145). He frequently had "closed door" meetings with Gluskin in that office. (Tr. 164-65). When the time came to offer Mastercraft stock for sale, it was Goldenberg who selected an attorney to handle the endeavor, Philip Leeds, who had been Goldenberg's attorney at First Standard. (Tr. 71). One of the brokers selected to handle the stock sale was recommended by Goldenberg and knew him. (Tr. 72). When Leeds

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* Judge Gagliardi held a hearing outside the presence of the jury of the question of Gluskin's relationship to Goldenberg. (Tr. 162-80). After concluding that an agency relationship had been established by a fair preponderance of the non-hearsay evidence, Judge Gagliardi then delivered a limiting instruction. (Tr. 181).

decided to move to Arizona, Goldenberg recommended that Gluskin fill in for him. (Tr. 93-94). Before Leeds left, he formed Superior Plan at Goldenberg's request and drafted the debentures which were later used to mask the money paid into Goldenberg's shell corporation, Superior Plans. (Tr. 74-77, 81-85).

Gluskin later paid over $500,000 of the moneys received from the sale of the Mastercraft stock to Goldenberg through Superior Plans, receiving in return debentures which Gluskin knew simply covered up the payment of income to Goldenberg. Gluskin knew the debentures were a sham, since Gluskin had given a letter to Goldenberg at the same time he received the debentures converting the debentures into worthless Superior Plans stock. (Tr. 88, 135). Finally, on one occasion, when Goldenberg removed money from the Superior Plans accounts, he represented Gluskin to be the attorney for Superior Plans. (GX 30; Tr. 277-78).

This non-hearsay evidence, demonstrating that Gluskin and Goldenberg were working closely together in connection with both the offering of Mastercraft stock and the intrigues necessary to disguise Goldenberg's receipt of over $500,000 in income from the proceeds of the offering, more than justified Judge Gagliardi's conclusion that Gluskin was acting as Goldenberg's agent.

In any event, any error in admitting this testimony was harmless beyond a reasonable doubt. Fed. R. Crim. P. 52(a); *Chapman* v. *California*, 386 U.S. 18 (1966). The principal issue of fact at trial was whether Goldenberg had removed over $500,000 from the Superior Plan accounts and used it not for a corporate purpose, as he claimed, but for his own use. Goldenberg's attempt to convince the jury that he had cashed close to $500,000 in Superior Plans checks and then invested the cash on behalf

of Superior Plans in a Las Vegas motel was a blatant fabrication. This became readily apparent to the jury when Goldenberg admitted not only that the Las Vegas motel had never been built but also that he had made no attempt whatsoever to recover the $500,000 cash investment! The unbelievability of the defendant's testimony was attested to by the jury's deliberations for less than one hour.

POINT II

The Evidence of Flight Was Admissible And The Court's Charge On Flight Was Not Erroneous.

Goldenberg claims that Judge Gagliardi erred in delivering a jury instruction on flight, since there was no evidence of flight adduced at the trial. On the contrary, there was substantial evidence from which the jury could infer that Goldenberg deliberately avoided arraignment on his indictment and attempted to remain at large by using a false identity.

Goldenberg's arraignment on the present indictment was scheduled for April 28, 1975. On April 25, 1975, Goldenberg spoke by telephone to the Assistant United States Attorney in New York in charge of the case and requested an adjournment of the date of his arraignment to May 12, 1975 to allow time for him to obtain an attorney. The Assistant agreed to this procedure, but warned that Goldenberg's failure to appear would result in the issuance of a bench warrant. Goldenberg later confirmed this arrangement by telegram. When Goldenberg failed to appear on May 12, 1975, a warrant was issued. Following a search for him by federal agents, Goldenberg was arrested on January 10, 1976 in a hotel parking lot in Orange, California. (Tr. 356-58; GX 36).*

* This evidence was introduced without objection through stipulation between the parties. (Tr. 356-57).

While at large, between April, 1975 and January, 1976, Goldenberg used at least two aliases—Bernard Cohen and Bernard Friedman. At the time of his arrest in January of 1976, he had documents in his possession indicating his use of those names. (Tr. 574-78; GX 49, 50, 51).* Goldenberg admitted he did not begin to use these aliases until after April of 1975, but denied that the purpose was to avoid arrest. (Tr. 593).**

Based on this testimony, Judge Gagliardi delivered an eminently fair and complete charge which permitted, but did not require, the jury to infer consciousness of guilt should they find that the defendant used an alias to avoid apprehension or deliberately engaged in flight.***

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* Goldenberg objected to the admission of these exhibits. (Tr. 578).

** Without any corroborative evidence Goldenberg also claimed to have continued to reside at the same address for several months after he learned of his indictment, and he further claimed to have spoken to an Agent of the FBI on another matter during this period of time. (Tr. 593-99).

*** The charge was as follows:

> "There has also been testimony to the effect that the defendant used names other than his own during the period of time after he was advised that he had been indicted and failed to appear as scheduled for his arraignment. If you find that, in fact, the defendant did use names other than his own, you may consider that in connection with an inference of a consciousness of guilt on his part. If you find beyond a reasonable doubt that he used a name other than his own in order to avoid apprehension, that would be a fact from which you may but need not infer a consciousness of guilt on his part. I think as I stated it last is the correct way to have stated it.
>
> There has been a stipulation in this case that the defendant did not appear at the scheduled time for his arraignment on these charges in New York and that he was subsequently arrested some months later in California. If you find that his failure to appear prior to his arrest con-

[Footnote continued on following page]

It has long been recognized that flight, like the spoilation of papers, is a legitimate ground for an inference of guilt. *Allen* v. *United States*, 164 U.S. 492, 499 (1896); *United States* v. *Accardi*, 342 F.2d 697, 700 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965); *United States* v. *Heitner*, 149 F.2d 105, 107 (2d Cir.) (L. Hand, *J.*), *cert. denied sub nom. Cryne* v. *United States*, 326 U.S. 727 (1945). A similar inference may be drawn from concealment or assumption of a false name. II Wigmore, Evidence, § 276, at 111 (3d ed. 1940).

Evidence of flight or concealment is not conclusive of guilt and is subject to varying interpretations, but is generally admissible as is other circumstantial evidence. *United States* v. *Ayala*, 307 F.2d 574, 576 (2d Cir. 1962); *United States* v. *Waldman*, 240 F.2d 449, 451-452 (2d Cir. 1957). The probative value of such testimony depends on the facts and circumstances of each case and is a question of fact properly left to the jury. *Shorter* v.

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stituted intentional flight with respect to this case, then you may consider this. The flight of a defendant after he has discovered that he has been charged with a crime is a fact which, if proved, may tend to prove consciousness of guilt on the part of a defendant and may be considered and weighed by a jury in connection with all the other evidence. Whether or not evidence of flight shows a consciousness of guilt and the significance, if any, to be attached to such circumstances are matters for your determination. A flight of a defendant does not create a presumption of guilt, but is merely a factor to be considered by you together with all the other evidence in determining the guilt or innocence of the defendant. . ." (Tr. 770-71). Goldenberg has not objected to the content of the charge itself, nor could he, since, by requiring the jury to find "beyond a reasonable doubt" that Goldenberg had used an alias in order to avoid apprehension, the charge was, if anything, more favorable to the defendant than the law requires. See Devitt & Blackmar, Federal Jury Practice and Instructions, § 11.18 (2d ed. 1970).

United States, 412 F.2d 428, 430 (9th Cir.), *cert. denied*, 396 U.S. 970 (1969).

In the present case, the evidence of conduct inconsistent with innocence was substantial and justified the Court's instruction on flight. See *United States* v. *Miles*, 468 F.2d 482, 489-90 (3d Cir. 1972). Goldenberg, after learning he had been charged with a crime, failed to appear at the adjourned date which he had requested. Thereafter, he commenced using several false names and was not apprehended for over eight months. *Compare United States* v. *Malizia*, 503 F.2d 578, 582 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975), with *United States* v. *Epperson*, 528 F.2d 48, 50 (9th Cir. 1975); and *United States* v. *White*, 488 F.2d 660, 662 (8th Cir. 1973).

In response to all of this, Goldenberg argues first that a flight instruction was inappropriate because he did nothing affirmative to avoid capture, but merely engaged in "passive non-compliance," and second that there was no testimony that Goldenberg had not used his aliases prior to April 1975, when he first learned of the charges against him. The short answer to both arguments is that Goldenberg's own testimony made clear that he did not begin to use the aliases until after he became aware of the charges against him in April, 1975 (Tr. 593), and therefore there was adequate proof of an active attempt to avoid capture. Moreover, it is difficult to see why a defendant's failure to surrender, after notice of the charges against him, where he is secreted in a place over 3,000 miles from the scene of the crime, using an alias, is any less probative of guilt than a defendant's active movements away from the scene of the crime. It is, after all, the fact that the defendant prefers to hide, rather than to confront his accusers which gives rise to a permissible inference of consciousness of guilt.

The only case that Goldenberg cites in which a flight charge has been found to be reversible error is readily distinguishable. In *United States* v. *Vereen*, 429 F.2d 713 (D.C. 1970), after a robbery the defendant left the scene of the crime; however, the defendant remained within a block radius, and thirty minutes later returned to the scene to speak to the victim, whereupon he was arrested. In these circumstances, the Court found the record "barren of meaningful evidence of flight," 429 F.2d at 715, and, in conjunction with another error, reversed the conviction. Here, quite plainly the record is not barren of meaningful evidence of flight.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN J. KENNEY,
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Form 280 A.- Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

THELMA WILKINSON being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15th day of November , 1976 he served a copy of the within Two U.S. Govt's Briefs (Appeal) by placing the same in a properly postpaid franked envelope addressed:

Morton Berger, Esq.
13 Eastbourne Drive
Spring Valley, NY 10977

And deponent further says that she sealed the said envelope and placed the same in the mail for mailing in the United States Attorney's Office, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Thelma Wilkinson

Sworn to before me this

15th day of November ,1976

Olga C. Grampp

OLGA C. GRAMPP
Notary Public New York State
No. 43-4620338
Qualified in Richmond Cty.
Comm. Expires March 30, 1977